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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

29
30 JIM BARON, Individually and On
31 Behalf of All Others Similarly Situated, } No. 2:06-cv-03731-GHK-SH
32 Plaintiff, } CLASS ACTION
33 vs. }
34 BRETT C. BREWER, et al., }
35 Defendants. }
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1 **I. PRELIMINARY STATEMENT**

2 Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Robbins Geller
3 Rudman & Dowd LLP (“Lead Counsel”) submits this memorandum in support of
4 Lead Plaintiff Jim Brown’s (“Lead Plaintiff”) motion for final approval of the
5 settlement of this litigation for \$45,000,000 in cash, and approval of the Plan of
6 Allocation of settlement proceeds. The terms of the settlement are set forth in the
7 Amended Stipulation of Settlement dated February 4, 2011 (the “Stipulation”).¹ This
8 outstanding settlement is the result of years of heavily-contested and vigorous
9 litigation, culminating in arm’s-length settlement negotiations overseen by Antonio
10 Piazza, Esq., a highly respected mediator with extensive experience in the resolution
11 of complex class actions.²

12 The settlement was achieved only after hard-fought litigation and extensive
13 efforts by Lead Counsel, who never gave up, even when it appeared that Lead
14 Plaintiff’s claims could not be pursued. As detailed in the accompanying Declaration
15 of Randall J. Baron in Support of Final Approval of Class Action Settlement, Plan of
16 Allocation of Settlement Proceeds, and an Award of Attorneys’ Fees and Expenses
17 (“Baron Decl.”), Lead Counsel: (a) filed complaints; (b) opposed numerous motions
18 to dismiss; (c) successfully opposed Defendants’ motion for partial summary
19 judgment on the issues of loss causation and damages; (d) obtained class certification
20 over Defendants’ vigorous opposition; (e) propounded and responded to written
21 discovery; (f) negotiated with Defendants and third parties over the scope of
22 discovery; (g) reviewed and analyzed over 123,000 pages of documents produced by
23 Defendants and third parties; (h) took and defended over 30 fact and expert

24
25 ¹ All capitalized terms not defined herein shall have the same meanings set forth
in the Stipulation.

26 ² Prior to negotiating with Mr. Piazza, in 2009, the parties attempted, in two
27 sessions, to mediate a resolution of the case before the Honorable Alexander H.
Williams, III, but were unsuccessful.

1 depositions; (i) litigated discovery disputes; (j) submitted six expert reports; (k) filed a
2 motion for partial summary judgment; (l) opposed Defendants' motions for summary
3 judgment; (m) litigated *Daubert* motions; and (n) conducted mediation and settlement
4 negotiation.

5 Defendants adamantly denied any liability and asserted they possessed absolute
6 defenses to Lead Plaintiff's claims. They presented these defenses at every
7 opportunity. During settlement negotiations, however, Lead Counsel made it clear
8 that, while it was prepared to fairly assess the strengths and weaknesses of Lead
9 Plaintiff's case, they would continue to litigate rather than settle for less than fair
10 value. In fact, two mediation sessions were unsuccessful, and the parties were
11 preparing for trial. Lead Plaintiff and Lead Counsel persisted until they achieved an
12 amount that they thought was fair under the circumstances of this case.

13 Lead Counsel, who is well-respected and experienced in prosecuting securities
14 and other complex class actions, has concluded that the settlement is an excellent
15 result and is in the best interest of the Class. This conclusion is based on an analysis
16 of all of the relevant factors present here, including the substantial risk, expense, and
17 uncertainty in continuing the litigation through trial, and probable appeal; the relative
18 strengths and weaknesses of the claims and defenses asserted; a complete analysis of
19 the evidence obtained to date and the legal and factual issues presented; past
20 experience in litigating complex actions similar to the present action; and the serious
21 disputes between the parties concerning the merits and damages.³

22 For all of the reasons discussed herein and in the Baron Declaration, it is
23 respectively submitted that the settlement, for \$45 million in cash, is eminently fair,
24

25 _____
26 ³ The Court is respectfully referred to the accompanying Baron Declaration for a
27 more detailed history of the litigation, the substantial efforts of counsel, and the
factors bearing on the reasonableness of the settlement and Plan of Allocation.

1 reasonable, and adequate to the Class and should be approved by the Court.⁴
2 Moreover, the Plan of Allocation, which tracks the theory of damages asserted and
3 provides all Class Members with a proportionately-equal recovery, is likewise fair,
4 reasonable, and adequate, and should be approved by the Court.

5 **II. THE STANDARDS FOR JUDICIAL APPROVAL OF CLASS
6 ACTION SETTLEMENTS**

7 It is well established in the Ninth Circuit that “voluntary conciliation and
8 settlement are the preferred means of dispute resolution.” *Officers for Justice v. Civil
9 Serv. Comm’n*, 688 F.2d 615, 625 (9th Cir. 1982). Class action suits readily lend
10 themselves to compromise because of the difficulties of proof, the uncertainties of the
11 outcome, and the typical length of the litigation. It is beyond question that “there is an
12 overriding public interest in settling and quieting litigation,” and this is “particularly
13 true in class action suits.” *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th
14 Cir. 1976); *see also Util. Reform Project v. Bonneville Power Admin.*, 869 F.2d 437,
15 443 (9th Cir. 1989). In deciding whether to approve the settlement of a stockholder
16 class action under Federal Rule of Civil Procedure 23(e), the court must find that the
17 proposed settlement is “fair, adequate, and reasonable.”⁵ The Ninth Circuit has set
18 forth factors which may be considered in evaluating the fairness of a class action
19 settlement:

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21 ⁴ The Class was certified by the Court in an Order dated June 22, 2009, and the
22 class definition was refined in the Stipulation to consist of all holders of Intermix
23 Media, Inc. common stock from July 18, 2005 through the consummation of the sale
24 of Intermix to News Corp. at the price of \$12.00 per share on September 30, 2005, and
25 were damaged thereby. Excluded from the Class are Defendants and any Affiliated
Person of any Defendant, as well as Brad Greenspan, any trusts or entities in which he
is an owner, trustee or beneficiary, and any Intermix shares held by any Person or
entity over which Mr. Greenspan has or had direct or indirect control. Also excluded
from the Class were those Persons who timely and validly requested exclusion from
the Class pursuant to the Notice of Pendency of Class Action.

26 ⁵ *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 377 (9th Cir. 1995) (citation
27 omitted); *Officers for Justice*, 688 F.2d at 625; *Marshall v. Holiday Magic, Inc.*, 550
F.2d 1173, 1178 (9th Cir. 1977).

1 Although Rule 23(e) is silent respecting the standard by which a
2 proposed settlement is to be evaluated, the universally applied standard
3 is whether the settlement is fundamentally fair, adequate and reasonable.
4 The district court's ultimate determination will necessarily involve a
5 balancing of several factors which may include, among others, some or
6 all of the following: the strength of plaintiffs' case; the risk, expense,
7 complexity, and likely duration of further litigation; the risk of
8 maintaining class action status throughout the trial; the amount offered in
9 settlement; the extent of discovery completed, and the stage of the
10 proceedings; the experience and views of counsel; the presence of a
11 governmental participant; and the reaction of the class members to the
12 proposed settlement.

13 *Officers for Justice*, 688 F.2d at 625 (citations omitted). *See also In re Lifelock, Inc.*,
14 No. 08-1977-MHM, 2010 U.S. Dist. LEXIS 102612, at *15 (D. Ariz. Aug. 31, 2010).
15 *Accord Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998); *Torrissi v.*
16 *Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993); *In re Wash. Pub. Power*
17 *Supply Sys. Sec. Litig.*, 720 F. Supp. 1379, 1387 (D. Ariz. 1989), *aff'd sub nom. Class*
18 *Plaintiffs v. Seattle*, 955 F.2d 1268 (9th Cir. 1992). “The relative degree of
19 importance to be attached to any particular factor will depend upon and be dictated by
20 the nature of the claims advanced, the types of relief sought, and the unique facts and
21 circumstances presented by each individual case.” *Officers for Justice*, 688 F.2d at
22 625.

23 The district court must exercise “sound discretion” in approving a settlement.
24 *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980), *aff'd*, 661 F.2d
25 939 (9th Cir. 1981); *Torrissi*, 8 F.3d at 1375. In exercising its discretion, “the court’s
26 intrusion upon what is otherwise a private consensual agreement negotiated between
27 the parties to a lawsuit must be limited to the extent necessary to reach a reasoned
28 judgment that the agreement is not the product of fraud or overreaching by, or

1 collusion between, the negotiating parties, and that the settlement, taken as a whole, is
2 fair, reasonable and adequate to all concerned.” *Officers for Justice*, 688 F.2d at 625.
3 The Ninth Circuit “has long deferred to the private consensual decision of the parties.”
4 *Rodriguez v. West Publ’g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009). The Ninth Circuit
5 defines the limits of the inquiry to be made by the court in the following manner:

6 Therefore, the settlement or fairness hearing is not to be turned into a
7 trial or rehearsal for trial on the merits. Neither the trial court nor this
8 court is to reach any ultimate conclusions on the contested issues of fact
9 and law which underlie the merits of the dispute, for it is the very
10 uncertainty of outcome in litigation and avoidance of wasteful and
11 expensive litigation that induce consensual settlements. The proposed
12 settlement is not to be judged against a hypothetical or speculative
13 measure of what **might** have been achieved by the negotiators.

14 *Officers for Justice*, 688 F.2d at 625 (emphasis in original). Applying these criteria
15 demonstrates that this settlement warrants the Court’s approval.

16 Moreover, “[t]he recommendations of plaintiffs’ counsel should be given a
17 presumption of reasonableness.” *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 622 (N.D.
18 Cal. 1979); *Ellis*, 87 F.R.D. at 18 (“the fact that experienced counsel involved in the
19 case approved the settlement after hard-fought negotiations is entitled to considerable
20 weight”).⁶ The presumption of reasonableness in this matter is fully warranted
21 because the settlement is the product of arm’s-length and mediator assisted
22 negotiations. *Hughes v. Microsoft Corp.*, No. C98-1646C, 2001 U.S. Dist. LEXIS
23 5976, at *17, *21 (W.D. Wash. Mar. 26, 2001). Here, it is the considered judgment of
24 experienced counsel after extensive litigation and vigorous and hard-fought settlement

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27 ⁶ *Accord Malchman v. Davis*, 761 F.2d 893, 903 (2d Cir. 1985); *Milstein v. Huck*,
28 600 F. Supp. 254, 262 (E.D.N.Y. 1984).

1 negotiations that the settlement is an outstanding result for the Class and should be
2 approved.

3 In sum, the Court is now asked to ascertain whether the settlement is within a
4 range that responsible and experienced attorneys could accept, considering all relevant
5 risk factors of litigation. *Weinberger v. Kendrick*, 698 F.2d 61, 74 (2d Cir. 1982);
6 *Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 (2d Cir. 1974). This range recognizes
7 the uncertainties of law and fact in any particular case and the concomitant risks and
8 costs necessarily inherent in taking any litigation to completion. Therefore, courts
9 have taken a liberal approach toward approval of class action settlements, recognizing
10 that the settlement process involves the exercise of judgment and that the concept of
11 “reasonableness” can encompass a broad range of results. “In most situations, unless
12 the settlement is clearly inadequate, its acceptance and approval are preferable to
13 lengthy and expensive litigation with uncertain results.” *Nat'l Rural Telecomms.*
14 *Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004) (citation omitted).

15 **III. THE SETTLEMENT IS FAIR, REASONABLE, AND
16 ADEQUATE**

17 **A. The Settlement Is the Product of Arm's-Length
18 Negotiations**

19 Lead Counsel has many years of experience in litigating complex actions and
20 has negotiated hundreds of other class action settlements that have been approved by
21 courts throughout the country. Defendants are also represented by highly capable and
22 very experienced counsel who zealously defended their clients. As a result, the
23 settlement was reached after arm's-length negotiations by experienced counsel on
24 both sides, each with a good understanding of the strengths and weaknesses of each
25 party's respective claims and defenses. During the litigation, the parties agreed to
26 participate in mediation and met with the Honorable Alexander H. Williams, III on
27 two separate occasions. Prior to the mediations, Lead Counsel prepared and submitted
28 detailed mediation statements discussing the strengths of Lead Plaintiff's claims

1 against the various Defendants. During the course of the mediation sessions, the
2 parties debated the merits of their respective claims and defenses. Lead Counsel
3 zealously advanced Lead Plaintiff's positions and was fully prepared to continue to
4 litigate rather than accept a settlement that was not in the best interest of the Class. As
5 evidence of this commitment, the mediation sessions were unsuccessful and litigation
6 continued through expert discovery and summary judgment.

7 Following the Court's issuance of its opinion on the motions for summary
8 judgment/adjudication, the parties agreed to another mediation, this time before
9 Antonio Piazza, Esq., an experienced mediator of complex litigation. At the end of a
10 full-day session, the parties reached an agreement-in-principle to settle the litigation
11 for \$45 million in cash. The agreement-in-principle was followed by negotiations
12 regarding the detailed terms of the settlement, including the scope of releases, and the
13 form and content of the notice to be sent to the Class. As a result of the negotiations
14 and mediation, there can be no question that the settlement was the result of hard
15 fought arm's-length negotiations and is "not the product of fraud or overreaching by,
16 or collusion between, the negotiating parties." *Officers for Justice*, 688 F.2d at 625.

17 **B. Reaction of the Class Supports Approval of the Settlement**

18 The Notice was sent to more than 9,800 potential Members of the Class. A
19 Summary Notice of the settlement was also published in *Investor's Business Daily* and
20 over the *PR Newswire*. See paragraphs 3-10 and 13 to the Declaration of Michael
21 Joaquin Re A) Mailing the Notice of Settlement of Class Action and the Proof of
22 Claim and Release Form, B) Publication of the Summary Notice, and C) Internet
23 Posting, submitted herewith. The time period for objecting to the settlement will
24 expire on April 21, 2011. To date, however, not a single objection to any aspect of the
25 settlement, the Plan of Allocation, or Lead Counsel's request for an award of
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1 attorneys' fees and expenses has been received.⁷ This is an important factor in
2 evaluating the fairness, reasonableness, and adequacy of the settlement and supports
3 approval. Indeed, “[i]t is established that the absence of a large number of objections
4 to a proposed class action settlement raises a strong presumption that the terms of a
5 proposed class settlement action are favorable to the class members.” *Nat'l Rural*,
6 221 F.R.D. at 529. The Class reaction to date is strong evidence that the Class
7 overwhelmingly supports the settlement and Plan of Allocation.

8 **C. The Settlement Appropriately Balances the Risks of
9 Litigation and the Benefit to the Class of a Certain
Recovery**

10 To determine whether the proposed settlement is fair, reasonable, and adequate,
11 the court must balance against the continuing risks of litigation, the benefits afforded
12 to members of the class, and the immediacy and certainty of a substantial recovery. *In*
13 *re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir. 2000); *Girsh v. Jepson*,
14 521 F.2d 153, 157 (3d Cir. 1975); *Boyd*, 485 F. Supp. at 616-17; *In re Warner*
15 *Commc'ns Sec. Litig.*, 618 F. Supp. 735, 741 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d
16 Cir. 1986). In other words,

17 “[t]he Court shall consider the vagaries of litigation and compare the
18 significance of immediate recovery by way of the compromise to the
19 mere possibility of relief in the future, after protracted and expensive
20 litigation. In this respect, ‘It has been held proper to take the bird in
21 hand instead of a prospective flock in the bush.’”

22 *Nat'l Rural*, 221 F.R.D. at 526 (citations omitted).

23 In the context of approving class action settlements, courts attempting to
24 balance these factors have recognized “that stockholder litigation is notably difficult

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27 ⁷ If any objections are received, Lead Counsel will address them in a reply brief.
28

¹ and notoriously uncertain.” *Lewis v. Newman*, 59 F.R.D. 525, 528 (S.D.N.Y. 1973);
² See also *Republic Nat'l Life Ins. Co. v. Beasley*, 73 F.R.D. 658, 667 (S.D.N.Y. 1977).

3 Although Lead Counsel believes that the litigation has significant merit, it
4 recognizes that it faced numerous risks and uncertainties and is well aware that many
5 other similar actions have been prosecuted in the belief that they were meritorious,
6 only to lose on dispositive motions at trial or on appeal. The settlement recognizes the
7 inherent risks of complex litigation involving a panoply of difficult and novel legal
8 and factual issues. As discussed herein and in the Baron Declaration, the risks of
9 continued litigation when weighed against the substantial and certain recovery for the
10 Class confirms the reasonableness of the settlement. The settlement is unquestionably
11 better than another distinct possibility – little or no recovery for the Class. Moreover,
12 even if the Lead Plaintiff was able to successfully prosecute this action through trial
13 and all appeals, there was no guarantee that a jury’s verdict would have been more
14 than the settlement amount and it would have taken years before all appeals were
15 settled and the Class received any payment.

1. **Continued Litigation Poses Substantial Risks in Establishing Liability and Damages**

17 Although Lead Plaintiff largely survived Defendants' attacks on the pleadings
18 and on summary judgment, the Class faced serious obstacles to recovery, both with
19 respect to liability and damages. The claims asserted in the litigation on behalf of the
20 Class were based on alleged breaches of fiduciary duty and proxy violations in
21 connection with Intermix's sales to News Corp. in mid-2005.

22 While the Lead Plaintiff believes that his claims are strong, establishing liability
23 at trial would by no means be guaranteed. Defendants have adamantly denied liability
24 and have asserted from the outset of the litigation that they possess absolute defenses
25 to Lead Plaintiff's claims. For example, defendants have steadfastly maintained that
26 the exculpatory provision in Intermix's Articles of Incorporation insulated them from
27 personal liability for breaches of duty of care, so that Lead Plaintiff was required to

1 demonstrate a breach of the duty of loyalty. They further argued that the Delaware
2 Supreme Court's recent decision in *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235 (Del.
3 2009) set a high bar that required Lead Plaintiff to show that Defendants utterly failed
4 to attempt to obtain the best sale price to show bad faith for a breach of loyalty claim,
5 and that Lead Plaintiff could not clear that bar, because Defendants were
6 knowledgeable and took adequate action in connection with the Acquisition, and
7 because Lead Plaintiff could not show that a majority of the Intermix Board was
8 interested in the merger. *See* Baron Decl., ¶142.

9 Defendants also challenged the key elements of Lead Plaintiff's §14(a) claim.
10 First, Defendants claimed that there was no evidence to support Lead Plaintiff's
11 allegations that the Proxy contained material misstatements or omitted material facts.
12 Defendants argued that the alleged omissions – *i.e.*, those concerning management
13 projections, Defendants' liability from derivative lawsuits, Viacom's interest in the
14 Company and the MySpace Option – were not material or were already disclosed.
15 Baron Decl., ¶143. Defendants also maintained that Lead Plaintiff had not provided
16 evidence of Defendants' scienter under §14(a), or that there was any evidence from
17 which Lead Plaintiff could prove that Intermix shareholders suffered any economic
18 loss. *Id.*

19 The Court's order on Defendants' motions for summary judgment crystallized
20 Lead Plaintiff's burdens at trial. In order to prove breach of fiduciary duty, Lead
21 Plaintiff will have to prove, among other things, that Rosenblatt did, in fact, favor
22 New Corp. over Viacom because he wanted future employment from News Corp.; that
23 Rosenblatt did, in fact, dodge and frustrate an imminent bid from Viacom; that
24 Rosenblatt manipulated the Board and/or the Board consciously permitted Rosenblatt
25 to control and run the sale process. Baron Decl., ¶173. To prove his §14(a) claim,
26 Lead Plaintiff will have to convince the trier of fact that there was a substantial
27 likelihood that a reasonable shareholder would have viewed information about
28

1 MySpace's then-current revenue and profits, management projections, and derivative
2 lawsuits important in deciding how to vote on the Acquisition. *Id.*

3 As discussed above, and in the Baron Declaration, the case entailed a number of
4 complex issues. Presenting these complex issues to a jury posed risks to the Class's
5 hopes for success at trial. While the Lead Plaintiff would have presented expert
6 testimony supporting his allegations, Defendants would have called experts to
7 contradict the Lead Plaintiff's experts and opine that Defendants were not liable under
8 applicable laws. Lead Counsel could not be certain that it would succeed in making
9 the jury believe Lead Plaintiff's experts or even understand these matters well enough
10 to reach a determination in the Class's favor. Moreover, because most, if not all, of
11 Lead Plaintiff's fact witnesses would have been adverse ones, he would be required to
12 infer from documents elements of the claims such as state of mind or intent – never an
13 easy endeavor.

14 Lead Counsel also recognizes that a finding by a jury is never assured and that
15 Defendants had potential defenses to Lead Plaintiff's claims that could create
16 significant risks to the Class's recovery. As a result, the Lead Plaintiff faced the risks
17 of establishing liability posed by conflicting testimony and evidence. Moreover, there
18 was no certainty that depositions would tend to support or disprove Lead Plaintiff's
19 allegations.

20 The risks of establishing liability posed by conflicting testimony and evidence
21 would be exacerbated by the following risks inherent in all shareholder litigation,
22 including the unpredictability of a lengthy and complex jury trial – the risk that
23 witnesses could suddenly become unavailable or jurors could react to the evidence in
24 unforeseen ways; the risk that the jury would find that some or all of the alleged
25 misrepresentations and omissions were not material; and the risk that the jury would
26 find that Defendants reasonably believed in the appropriateness of their actions at the
27 time and that the Lead Plaintiff failed to prove that Defendants acted with the requisite
28 state of mind.

1 Even if Lead Plaintiff overcame the significant risks of proving liability, he
2 would still face the risks of proving damages. The determination of damages is a
3 complicated and uncertain process involving conflicting expert testimony. Expert
4 testimony could rest on many subjective assumptions, any of which could be rejected
5 by a jury as speculative or unreliable. The Lead Plaintiff would have likely faced a
6 renewed motion *in limine* by Defendants to preclude Lead Plaintiff's damage expert's
7 testimony under the *Daubert* test and risked a decision that his methodologies were
8 not admissible in evidence.

9 If the Lead Plaintiff survived the *Daubert* motion, at trial the damage
10 assessments of the Lead Plaintiff's and Defendants' experts were sure to vary
11 substantially, and in the end, this crucial element at trial would be reduced to a "battle
12 of experts." Moreover, here, two eminently qualified experts have polar opposite
13 opinions on the amount of damages – from \$0 per share to as much as \$14 per share,
14 based upon review and analysis of the same underlying information. Following the
15 Court's ruling on the motion for summary judgment, the only viable damages theory
16 is the "out-of-pocket" losses theory. Under that theory, Lead Plaintiff would have
17 been required to convince the trier of fact what the "fair value" of Intermix, including
18 its MySpace asset, was at the time of the Acquisition. Baron Decl., ¶174. By 2009,
19 however, MySpace was a different asset than it was in 2005, and it was likely that the
20 trier of fact would perceive MySpace to be obsolete in comparison to contemporary
21 popular websites like Facebook, and would believe MySpace to be worth less than
22 what News Corp. paid for it in the Acquisition, or worth nothing at all. *Id.* The
23 reaction of a jury to such testimony is highly unpredictable and Lead Counsel
24 recognizes the possibility that a jury could be swayed by convincing experts for the
25 Defendants. The Defendants would attempt to convince the jury to find that, when
26 taking into consideration post-Acquisition facts, there were no damages or that only a
27 fraction of the amount of damages the Lead Plaintiff asserted were causally related to
28

1 the alleged wrongdoing. *See, e.g., Robbins v. Koger Props.*, 116 F.3d 1441, 1448-49
2 (11th Cir. 1997) (finding no loss causation and overturning \$81 million jury verdict).

3 This action involves substantial risks in proving liability and damages. There is
4 no question that Defendants would have raised every available argument to avoid an
5 adverse judgment had litigation continued. The defenses raised by Defendants had
6 some possibility of success, making the ultimate outcome difficult to discern. Lead
7 Counsel's experience has taught them how the above-mentioned factors can make the
8 outcome of a trial extremely uncertain. Moreover, even if the Lead Plaintiff prevailed
9 at trial, risks to the Class remain. For example, in *Backman v. Polaroid Corp.*, 910
10 F.2d 10, 18 (1st Cir. 1990), the class won a jury verdict and a motion for J.N.O.V. was
11 denied, but on appeal the judgment was reversed and the case dismissed. *See also W.*
12 *Va. v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 743-44 (S.D.N.Y. 1970) ("It is known
13 from past experience that no matter how confident one may be of the outcome of
14 litigation, such confidence is often misplaced."), *aff'd*, 440 F.2d 1079 (2d Cir. 1971);
15 *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 309 (2d Cir. 1979) (reversing
16 \$87 million judgment after trial); *Robbins*, 116 F.3d at 1449 (reversing on appeal \$81
17 million jury verdict and dismissing securities action with prejudice); *AUSA Life Ins.*
18 *Co. v. Ernst & Young*, 39 Fed. Appx. 667 (2d Cir. 2002) (affirming district court's
19 dismissal after a full bench trial and earlier appeal and remand); *Winkler v. NRD*
20 *Mining, Ltd.*, 198 F.R.D. 355 (E.D.N.Y.) (granting defendants' motion for judgment
21 as a matter of law after jury verdict for plaintiffs), *aff'd sub nom. Winkler v. Wigley*,
22 242 F.3d 369 (2d Cir. 2000).

23 In summary, although Lead Counsel believes that the case is meritorious, its
24 experience has taught them that the risks discussed above can render the outcome of a
25 trial extremely uncertain. *See In re Mfrs. Life Ins. Co. Premium Litig.*, No. MDL
26 1109, 1998 U.S. Dist. LEXIS 23217, at *17 (S.D. Cal. Dec. 21, 1998) ("even if it is
27 assumed that a successful outcome for plaintiffs at summary judgment or at trial
28 would yield a greater recovery than the Settlement – which is not at all apparent –

1 there is easily enough uncertainty in the mix to support settling the dispute rather than
2 risking no recovery in future proceedings"). Consideration of the above risks supports
3 approval of the settlement as fair, adequate, and reasonable.

4 **2. Balancing the Certainty of an Immediate Recovery
Against the Expense and Likely Duration of Trial
Favors Settlement**

5 The immediacy and certainty of a recovery is a factor for the Court to balance
6 in determining whether this proposed settlement is fair, adequate, and reasonable.
7 *E.g., Girsh*, 521 F.2d at 157. Courts consistently have held that “[t]he expense and
8 possible duration of the litigation should be considered in evaluating the
9 reasonableness of [a] settlement.” *Milstein*, 600 F. Supp. at 267; *see also Officers for
10 Justice*, 688 F.2d at 626; *Boyd*, 485 F. Supp. at 616-17. Absent this settlement, the
11 litigation would have likely dragged on for several more months or even years as the
12 parties prepared for trial, at considerable expense, without the Class receiving the
13 immediate and substantial benefit of the settlement, thus creating the possibility that
14 the Class would ultimately receive less or no recovery at all.

15 As the Court is well aware, Defendants have demonstrated a commitment to
16 defend this case through and beyond trial, if necessary, and are represented by well-
17 respected and highly capable counsel. If not for this settlement, the case would have
18 continued to be fiercely contested by all parties. The expense and time of continuing
19 litigation through trial would have been substantial. A pre-trial order would have to
20 be prepared, proposed jury instructions would have to be submitted, and motions *in
21 limine* would have to be filed and argued. Substantial amounts of time would need to
22 be expended in preparing this case for a trial. Moreover, the trial of this litigation
23 would have been long, expensive, and uncertain and no matter what the outcome,
24 appeals would be virtually assured. Taking into account the likelihood of appeal,
25 absent this settlement, the litigation would have continued for years, despite the efforts
26 of the Court and the parties to speed the process. *See In re Chambers Dev. Sec. Litig.*,
27 912 F. Supp. 822, 837 (W.D. Pa. 1995) (“It is safe to say, in a case of this complexity,
28

1 the end of that road might be miles and years away.”). All of the foregoing would
2 have delayed the ability of the Class to recover for several years. Settlement at this
3 juncture results in an immediate and certain recovery, without the attendant risk,
4 expense, and delay of trial and post-trial litigation.

5 As the Ninth Circuit has made clear, the very essence of a settlement agreement
6 is compromise, ““a yielding of absolutes and an abandoning of highest hopes.””
7 *Officers for Justice*, 688 F.2d at 624 (citation omitted).

8 “Naturally, the agreement reached normally embodies a compromise; in
9 exchange for the saving of cost and elimination of risk, the parties each
10 give up something they might have won had they proceeded with
11 litigation. . . .”

12 *Id.* (citation omitted); *Ellis*, 87 F.R.D. at 19 (as a *quid pro quo* for not having to
13 undergo the uncertainties and expenses of litigation, the plaintiffs must be willing to
14 moderate the measure of their demands). Accordingly, the fact that the Class
15 potentially could have achieved a greater recovery after trial does not preclude the
16 Court from finding that the settlement is within a “range of reasonableness” that is
17 appropriate for approval. *E.g.*, *Warner Commc’ns*, 618 F. Supp. at 745.

18 **D. The Parties Have Engaged in Sufficient Pretrial Discovery
19 and Proceedings to Identify the Strengths and Weaknesses
of Their Cases**

20 The stage of the proceedings and the amount of discovery completed is another
21 factor which the courts consider in determining the fairness, reasonableness, and
22 adequacy of a settlement. *Officers for Justice*, 688 F.2d at 625. Here, both the
23 knowledge of Lead Counsel and the proceedings themselves have reached a stage
24 where Lead Counsel could make an intelligent evaluation of the litigation and
25 propriety of this settlement.

26 Lead Counsel conducted significant informal and formal discovery and
27 investigation through witness interviews on the matters alleged, reviewed over
28 123,000 pages of documents produced by Defendants and third parties, took or

1 defended over 30 depositions and retained experts in damages, accounting, mergers
2 and acquisitions and business valuation, and exchanged expert reports and rebuttal
3 reports with Defendants. The parties also participated in three separate mediation
4 sessions where the strengths and weaknesses of the parties' respective claims and
5 defenses were fully explored. The parties had fully adjudicated Defendants' motions
6 to dismiss, Lead Plaintiff's motion for class certification and cross motions for
7 summary judgment and/or adjudication, and exchanged expert reports, all of which
8 highlighted the factual and legal issues in the litigation. Virtually all that remained to
9 be done was prepare for trial. Thus, the parties reached an agreement to settle the
10 litigation at a point when they had an informed understanding of the legal and factual
11 issues surrounding the case. *See Mego Fin.*, 213 F.3d at 459. Having sufficient
12 information to properly evaluate the case, Lead Counsel settled the litigation on terms
13 favorable to the Class without the substantial expense, risks, uncertainty, and delay of
14 continued litigation.

15 **E. The Recommendations of Experienced Counsel Favor
16 Approval of the Settlement**

17 ““Great weight is accorded to the recommendation of counsel, who are most
18 closely acquainted with the facts of the underlying litigation.”” *Nat'l Rural*, 221
19 F.R.D. at 528 (citation omitted).

20 Here, Lead Counsel, who is actively involved and experienced in complex
21 federal civil litigation, has weighed all of the relevant factors and has concluded that
22 the settlement is a favorable result that is in the best interest of the Class. Where, as
23 here, the settlement is the product of serious, informed, and non-collusive
24 negotiations, ““the trial judge . . . should be hesitant to substitute its own judgment for
25 that of counsel.”” *Id.* (citations omitted). *See also Kirkorian v. Borelli*, 695 F. Supp.
26 446, 451 (N.D. Cal. 1988) (“The recommendation of experienced counsel carries
27 significant weight in the court’s determination of the reasonableness of the
28 settlement.”); *Fisher Bros. v. Cambridge-Lee Indus., Inc.*, 630 F. Supp. 482, 488 (E.D.

1 Pa. 1985); *Ellis*, 87 F.R.D. at 18 (“the fact that experienced counsel involved in the
2 case approved the settlement after hard-fought negotiations is entitled to considerable
3 weight”).

4 **F. The Risks of Maintaining the Class Action Through Trial
Support the Settlement**

5 This factor also supports the settlement. Although a class had been certified
6 and there is no reason to support decertification, there can be no certainty of
7 maintaining this status through trial as courts may exercise their discretion to re-
8 evaluate the appropriateness of class certification at any time, and Defendants would
9 likely move to decertify the Class prior to trial.

10 In sum, each of the above factors fully supports a finding that the settlement is
11 fair, reasonable, and adequate, and deserving of approval.

12 **IV. THE PLAN OF ALLOCATION IS FAIR AND REASONABLE**

13 Lead Plaintiff also seeks approval of the Plan of Allocation of the settlement
14 proceeds (the “Plan”). The Plan was set forth in the Notice mailed to Class Members.
15 Distribution under the Plan will be made on a pro-rata basis depending on the number
16 of shares each Class Member held continuously during the Class Period, and which
17 were paid \$12.00 per share in the Acquisition. Assessment of a plan of allocation in a
18 class action under Federal Rule of Civil Procedure 23 is governed by the same
19 standards of review applicable to the settlement as a whole – the plan must be fair and
20 reasonable. *See In re Ikon Office Solutions, Inc.*, 194 F.R.D. 166, 184 (E.D. Pa.
21 2000); *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1284 (9th Cir. 1992); *Atlas v.
22 Accredited Home Lenders Holding Co.*, No. 07-CV-00488-H (CAB), 2009 U.S. Dist.
23 LEXIS 103035, at *13 (S.D. Cal. Nov. 4, 2009). District courts enjoy “broad
24 supervisory powers over the administration of class-action settlements to allocate the
25 proceeds among the claiming class members . . . equitably.” *Beecher v. Able*, 575
26 F.2d 1010, 1016 (2d Cir. 1978); *accord In re Chicken Antitrust Litig. Am. Poultry*, 669
27 F.2d 228, 238 (5th Cir. 1982).

1 The objective of a plan of allocation is to provide an equitable basis upon which
2 to distribute the settlement fund among eligible class members. Here, all Class
3 Members are similarly situated because each Class Member received the same
4 consideration for their Intermix shares in the Acquisition. Here, all Class Members
5 will receive the same pro rata distribution from the Settlement Fund. Thus, all Class
6 Members are being treated equally and fairly. An allocation formula need only have a
7 reasonable, rational basis, particularly if recommended by “experienced and
8 competent” class counsel. *White v. NFL*, 822 F. Supp. 1389, 1420 (D. Minn. 1993);
9 *In re Gulf Oil/Cities Serv. Tender Offer Litig.*, 142 F.R.D. 588, 596 (S.D.N.Y. 1992).

10 Lead Counsel believes that the Plan will result in a fair and equitable
11 distribution of the proceeds among Class Members who submit valid claims and, thus,
12 it should be approved. It is also important to note that to date, no Class Members have
13 objected to the proposed Plan.

14 | V. CONCLUSION

15 The settlement obtained here is an outstanding result under any measure, given
16 the presence of skilled counsel for all parties, the mediator-assisted settlement
17 negotiations, the considerable risk, expense, and delay if the litigation were to
18 continue, and the certain and immediate benefit of the settlement to Members of the
19 Class. In addition, the Plan is fair, reasonable, and adequate. Therefore, the Lead
20 Plaintiff respectfully requests this Court to approve the settlement of this litigation and
21 the Plan as fair, reasonable, and adequate.

22 | DATED: March 21, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2011, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I caused to be mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on March 21, 2011.

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